



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before:

Judge	William	H.	Sekule,	Presiding
Judge		Arlette		Ramaroson
Judge Solomy Balungi Bossa				

Registrar: Mr Adama Dieng

Date: 25 October 2004

The PROSECUTOR

v.

Élie NDAYAMBAJE

Case No. ICTR-96-8-T

Joint Case No. ICTR-98-42-T

**DECISION ON NDAYAMBAJE'S CONFIDENTIAL MOTION TO HAVE
DETAINEE TESTIMONY DECLARED INADMISSIBLE**

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“Tribunal”),

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the “Chamber”);

BEING SEISED of the “*Requête confidentielle et en extrême urgence d’Elie Ndayambaje aux fins de déclarer irrecevable les témoignages des témoins entendus au Procès et ayant été détenus dans les cachots et autres centres de détention au Rwanda, préalablement à leur témoignage,*” filed on 13 October 2004, (the “Motion”);

CONSIDERING the “Prosecutor’s Response to Ndayambaje Confidential Motion to Have Detainee Testimony Declared Inadmissible (Rules 73 and 95 of the Rules of Procedure and Evidence),” filed on 19 October 2004 (the “Response”);

CONSIDERING the “*Réplique à la réponse du Procureur sur la requête confidentielle et en extrême urgence d’Elie Ndayambaje aux fins de déclarer irrecevable les témoignages des témoins entendus au procès et ayant été détenus dans les cachots et autres centres de détention au Rwanda, préalablement à leur témoignage,*” filed on 22 October 2004 (the “Defence Reply”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

NOW DECIDES the matter, pursuant to Rule 73 (A), on the basis of the written submissions of the Parties.

The Defence’s Submissions

1. The Defence alleges that despite the Decision issued on 8 June 2001 by Trial Chamber II,^[1] the Prosecution disclosed to it only on 31 January 2002 the unredacted statements of five detained witnesses bearing information regarding the identity, the date of birth and finally the origin of each witness. Therefore, the Defence was not able, prior to this date, to investigate said witnesses with regard to the circumstances surrounding their arrest and detention.

2. The Defence further submits that if it had obtained such relevant information prior to the date when these detained witnesses gave testimony before the Chamber, the Defence would have objected to their being called as Prosecution witnesses.

3. The Defence points to several factors which surrounded their arrest and their detention in Rwanda, including: the exact nature of the case against those detained persons; the categorization of the offence(s) for which they are charged under Rwandan Law; the conditions surrounding their arrest; any change in their detention conditions;

any agreement between them and the Rwandan authorities about sentence, reduction or acquittal in exchange of confession; any prior judicial record; and any other material benefit the detainees or members of their families may derive in return for any denunciations they may make.

4. The Defence alleges that those factors directly affect the fairness of the proceedings, which could amount to the inadmissibility of the in-Court testimonies of the said detained witnesses.

5. The Defence alleges that some witnesses called so far to testify in the case as well as national or international human rights organizations and former detainees (released or fugitive) unanimously deplore the conditions of arrest and detention of accused persons in Rwanda since 1994,^[2] and discuss the procedure used to extort confession or to get denunciation from detainees.

6. The Defence submits that Prosecution Witnesses FAG, FAL, FAU, QAF, QBZ and RV who testified against Ndayambaje are currently detained and that they all made confessional statements and denounced their purported accomplices while they served time either in communal jail or in other detention facilities. The Defence submits that the said detained witnesses received better treatment in terms of their detention conditions for the confessions and denunciations made.

7. The Defence adds that these detained witnesses were kept at Kibayi or at Muganza communal jails right after their arrest and that the detention conditions in these communal jails have been cruel and inhumane since 1994. The Defence submits that the said communal jails are overcrowded; the detainees suffer from malnutrition and cruel treatment as was testified to by Prosecution witness RV. The Defence concludes that confessions obtained under such conditions are absolutely unreliable, despite certain witnesses' testimony that their confessions were freely given. In addition and as imposed by the Rwandan authorities, detainees are compelled to denounce their purported accomplices when giving their confessions.

8. The Defence further submits that it received letters^[3] from former detainees (potential Defence witnesses GABON, SAF 66 and SAF 67) from Muganza communal jail who have managed to escape. They unanimously stated that they were forced, by ill treatment, to denounce Ndayambaje. They also state that other detainees died as result of the torture and cruel treatment they received for the purpose of denouncing Ndayambaje.

9. The Defence recalls that the Prosecution had refused to disclose information pertaining to the facts and circumstances surrounding those witnesses' detention conditions, despite the Trial Chamber's Decision of 15 November 2001^[4] to the effect that the Prosecution discloses to the Defence the complete information pertaining to the judicial status and statements of the 27 detained witnesses.

10. The Defence thus prays that: (i) the Chamber find inadmissible under Rule 95, all the testimonies of detained witnesses who testified against the Accused because the said

witnesses have been subjected to such conditions as to render their testimony partial and lacking in credibility; and (2) the Chamber order that the annexes to its Motion be translated from Kinyarwanda into French and English and that the Chamber order this translation before the deadline for filing any Rule 98 *bis* Motion.

Prosecution's Submissions

11. The Prosecution opposes the Defence Motion and submits that it is frivolous and lacks merit. The Prosecution submits that in requesting an exclusion of evidence, the Defence simply relies on the status of witnesses as detainees without establishing that their evidence is indeed unreliable and lacks credibility.

12. The Prosecution stresses that the Trial Chamber has had ample opportunity to listen to the detained witnesses, to observe their demeanor and to decide what weight to give to their testimony. Not one of them told the court that he retracts his prior statements because it was forced out of him, despite lengthy cross-examination.

13. The Prosecution specifies that Rule 95 does not apply in this case, as the testimony of the witnesses was delivered under the control of the Trial Chamber.

14. The Prosecution further submits that these letters purportedly from potential Defence witnesses do not meet the minimum requirements for admission into evidence and that they are unreliable and should be ignored. The Prosecution finally alleges that the evidence given in court by the Prosecution witnesses was not obtained by methods which cast doubt on its reliability.

HAVING DELIBERATED

15. The Chamber observes that in its Motion, the Defence requests an exclusion of the evidence of Prosecution Witnesses FAG, FAL, FAU, QAF, QBZ and RV given their detention conditions and the conditions under which they made their confessional statements. The Defence submits that it obtained information regarding the said detained witnesses' conditions of detention after the said witnesses testified before the Chamber and that had it known the said conditions, it would have objected to their being called as witnesses.

16. Prosecution Witnesses FAG, FAL, FAU, QAF, QBZ and RV testified by the usual process of examination-in-chief and were duly cross-examined by the Defence. The Defence of Ndayambaje now seeks to have the testimonies of these witnesses expunged from the record. But the Defence has made no attempt to show why the testimony of each witness should be expunged; the Defence has merely lumped them all together and attacked them in general terms by virtue of their status as detained witnesses. This evidence was given on oath or affirmation and no substantive evidence has been given that would justify the expunging of such evidence. In the Chamber's view, mere allegations contained in the submissions of counsel or letters from potential witnesses would not suffice. The Chamber finds the Defence request as lacking in legal basis.

17. The Chamber further observes that the Defence request for the exclusion of the said evidence is made pursuant to Rule 95, which provides, “No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.”

18. Given that the concerned evidence were testimonies given under oath or affirmation before the Chamber, the Chamber finds that, the Defence fails to show that the evidence these detained witnesses has given was obtained by methods which cast substantial doubt on its reliability or that its admission is antithetical to, and would seriously damage the integrity of the proceedings.

19. The Chamber is of the view that the opportunities remain open to the Defence to make its case with regard to the already admitted evidence of the above-mentioned witnesses, and now that the Prosecution case has been closed and should it be applicable, after the close of the Defence case, the Chamber will at the end, make an assessment of the weight to attach to all the evidence before it.

20. On the above basis, the Chamber denies the Defence’s residual request to order the translation of the annexes to its Motion.

21. With regard to the Defence’s second residual request to grant an extension for filing a Rule 98*bis* Motion, the Chamber denies the prayer on the same reasoning as that on which a similar request was denied in the Chamber’s Decision on Defence Extremely Urgent Motion for Extension of Time for Filing a Motion under Rule 98*bis*, issued on 21 October 2004 in this case.

FOR THE ABOVE REASON: THE TRIBUNAL

DENIES the Motion in its entirety

Arusha, 25 October 2004

William H. Sekule
Presiding Judge

Arlette Ramaroson
Judge

Solomy Balungi Bossa
Judge

[Seal of the Tribunal]

[\[1\]](#) *Prosecution v. Nyiramasuhuko et. al.* (Case No. ICTR-98-42-T) (TC), Decision on the Full Disclosure of the Identity and Unredacted Statements of the Protected Witnesses.

[2] The Defence mentions in the Motion report or articles excerpts from the following persons or organisations notably: a former RPF Minister in the Rwandan Government called Faustin Nteziryayo, René Degni Ségui, Amnesty International, the International Committee for the Red Cross, International Federation of Human Rights and finally the Special Investigation Unit of UN.

[3] Annex 1.B, 2.B and 3.B. These redacted letters are written in Kinyarwanda.

[4] *Prosecutor v. Ndayambaje et. al* (Case No. ICTR-98-42-T) (TC), Decision on the Defence Motions Seeking Documents relating to Detained Witnesses or Leave of the Chamber to Contact Protected Detained Witnesses.